In the Supreme Court of the United States

No. 77-1039

H. BRUCE FRANKLIN,
Petitioner,

vs.

DALE M. ATKINS, ROBERT M. GILBERT, PROF. BYRON L. JOHNSON, FRED M. BETZ, SR., ERIC W. SCHMIDT, THOMAS S. MOON, JACK KENT ANDERSON and RAPHAEL J. MOSES, individually and in their representative capacities as members of the Board of Regents of the University of Colorado,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN P. HOLLOWAY, ESQ.
University of Colorado
Boulder, Colorado 80309
(303) 492-6208

RICHARD A. THARP, ESQ.
University of Colorado
Regent Hall, Box 13, Room 203
Boulder, Colorado 80309
(303) 492-7481
Counsel for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

Authorities Cited

CASES

STATUTES AND RULES

In the Supreme Court of the United States

No. 77-1039

H. BRUCE FRANKLIN,
Petitioner,

vs.

DALE M. ATKINS, ROBERT M. GILBERT, PROF. BYRON L. JOHNSON, FRED M. BETZ, SR., ERIC W. SCHMIDT, THOMAS S. MOON, JACK KENT ANDERSON and RAPHAEL J. MOSES, individually and in their representative capacities as members of the Board of Regents of the University of Colorado,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ISSUES PRESENTED FOR REVIEW

Can the Respondents' rejection of Petitioner's initial appointment to the English faculty of a State University be judicially sustained:

1.) If the primary motivating basis for rejection is premised upon constitutionally permissible considerations; or

2.) If Petitioner fails to demonstrate that the rejection was motivated in part by constitutionally impermissible considerations; or

3.) If, assuming the elimination of any constitutionally impermissible considerations, the Respondents' action on Petitioner's appointment would have resulted in the same decision?

STATEMENT OF THE CASE

On April 25, 1974, the Respondents, eight members of the Board of Regents of the University of Colorado, voted not to appoint Petitioner to the English faculty of the University of Colorado. Subsequently, at the June 25, 1974 meeting, Respondents voted not to rescind their decision to reject Petitioner's appointment.

During the course of the decision-making process Respondents received numerous articles, background materials and general correspondence pertaining to Petitioner. This material was supplied from a variety of sources, including colleagues of Petitioner, students and the general citizenry. The materials, all of which were reviewed by the Respondents, contained a variety of comments concerning past activities of Petitioner. Included in these materials was a report by the Stanford Advisory Committee which had concluded and recommended that Petitioner should be dismissed as a tenured faculty member from Stanford University for violations which constitute "substantial and manifest neglect of duty or personal conduct substantially impairing the individual's performance of his appropriate function within the University community." (See Appendix A)

Petitioner filed suit in the United States District Court for the District of Colorado, for mandatory injunctive relief, declaratory relief and damages pursuant to 42 U.S.C. 1983 and 28 U.S.C. 2201 alleging that Respondents had violated his constitutional rights under the First and Fourteenth Amendments to the United States Constitution and, in a pendant claim, that Respondents had violated Article X, Section C of their own Laws pertaining to University governance.

On February 11, 1976, the District Court issued a Memorandum Opinion in favor of Respondents in which the Court concluded, in light of the evidence before it, that the rejection of Petitioner's appointment was primarily motivated by permissible considerations as a result of their reliance on matters contained in the Stanford Advisory Board Report. That certain impermissible considerations were present and were in fact taken into account to at least some extent by one or more of the Respondents. However, the Court, in discussing the pendant claim, determined that, even given the fact that various defendants did take into account constitutionally impermissible considerations in reaching their individual decisions, the outcome of the vote would have remained unchanged due to consideration of the existence of constitutionally permissible considerations. 409 F.Supp. 439 (1976).

Petitioner appealed to the United States Court of Appeals For The Tenth Circuit. The Court of Appeals affirmed the Trial Court holding, in light of *Mt. Healthy Board of Education* v. *Doyle*, 429 U.S. 274 (1977), 50 L.Ed. 2d 471 (1977), that Petitioner failed to meet the burden that his conduct was constitutionally protected. The Court of Appeals said that Petitioner did not demonstrate that the Stanford Advisory Report as so considered by Respondents, was in whole or in part a description of constitutionally protected conduct. Secondly, the Court concluded that, assuming the presence of impermissible considerations, Petitioner did not show that these considerations were substantial or motivating factors in the decision not to hire and, in any event, as found by the Trial Court as a matter of fact, and affirmed by the Court of Appeals upon review of the record, the Respondents' vote would have been the same had impermissible factors not been considered.

Petitioner's Petition for Rehearing *en banc* was denied October 25, 1977.

ARGUMENT IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI

1. THE DECISION OF THE COURT OF APPEALS, AFFIRMING THE DISTRICT COURT'S OPINION, IS CONSISTENT WITH THE HOLDINGS AND REASONING OF THIS COURT IN *MT. HEALTHY BOARD OF EDUCATION* v. *DOYLE*, 429 U.S. 274 (1977), 50 L.Ed.2d 471 (1977).

A. Analysis of the Appropriate Judicial Inquiry Under Mt. Healthy.

The Respondents, like many other members of Boards of Regents of state universities, are charged with the responsibility to make faculty appointments to their institutions. 23-20-112, COLORADO REVISED STATUTES, 1973, reads:

> *General powers of the board.* The board of regents shall enact laws for the government of the university; appoint the requisite number of professors, tutors, and all other officers; and determine the salaries of such officers and the amount to be paid for tuition in accordance with the level of appropriations set by the general assembly for the university. It shall remove any officer connected with the university when in its judgment the good of the institution requires it.

Pursuant to judicial interpretation of state law this is a non-delegable authority. *University of Colorado* v. *Silverman*, 555 P.2d 1155 (1976). Nor are Respondents limited to a restricted inquiry in the hiring process, but may consider a broad range of factors. *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Beilan* v. *Board of Education*, 357 U.S. 399 (1958). But, Respondents cannot act to deny employment

on a basis which directly or indirectly impinges on the Petitioner's exercise of constitutionally protected rights. In so holding in *Perry* v. *Sindermann*, 408 U.S. 593 (1972) this Court recognized that an individual should have an opportunity to demonstrate the validity of an assertion that an adverse action was bottomed on impermissible considerations which affected the exercise of constitutional prerogatives. However, in *Mt. Healthy* this Court cautioned against analysis by which "an employee could place himself in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Mt. Healthy* at 285. Thus, this Court stated, as the proper judicial analysis,

> "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that his conduct was a 'substantial factor or, to put it in other words, that it was a motivating factor'[2] in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." (Footnote citation to *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977); *Mt. Healthy, supra* at 287.)

This Court in referencing the *Arlington Heights* decision implicitly recognized that solely searching for a primary motivating factor is not dispositive, for a subordinate impermissible consideration may be shown to be a motivating factor, which would require shifting of the burden of proof to establish that the decision would have been the same had the impermissible considerations not been con-

sidered. *Village of Arlington Heights, supra*, n. 21 at 270, 271.

Thus, at Trial the Petitioner had the initial burden of showing that:

i) His conduct was constitutionally protected; and

ii) this conduct was a substantial or motivating factor in the Respondents' decision not to hire him.

Or, failing this proof, he must demonstrate that:

i) Other conduct that was considered was constitutionally protected; and

ii) The consideration of this conduct motivated in part the decision not to hire him.

Under either analysis, assuming Petitioner has met his burden, the judicial inquiry does not end. The burden is shifted to the Respondents to demonstrate that even if the impermissible motivating considerations were eliminated, the decision would have been the same.

B. The Decision of the Court of Appeals, Affirming the District Court, Properly Applied the Mt. Healthy Standard of Judicial Inquiry.

This Court recognized in *Village of Arlington Heights* that:

> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached.
>
> The legislative or administrative history may be highly relevant, especially where there are contemporary statements made by members of the decision-making body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand to testify concerning the purpose of the official action. . . ." *Village of Arlington Heights, supra* at 270.

Likewise, seeking the primary, substantial or motivating factors which affect Respondents' decision herein, the Trier of Fact must avail himself of all available information. This was precisely what the Trial Court did,

> "There can be no more difficult task for a court than to try and discern the thought processes which lead to a certain result, much less to ascertain the *primary* motivation. In this case it it [sic] necessary to carefully consider the evidence relating to each defendant." 409 F.Supp. 439, at 447. (See Summary of Testimony, 409 F.Supp. 439 at 447, 448.)

The Court concluded that the paramount, primary motivating factor was the Respondents' reliance on the activities of Petitioner as contained in the Stanford Advisory Report. Further, the District Court concluded that the burden was on Petitioner to establish that his activities at Stanford were protected. 409 F.Supp. 439, at 450. The Trial Court concluded on the basis of an independent review of the record that his activities were not constitutionally protected. 409 F.Supp. 439, at 451, the Court of Appeals, applying *Mt. Healthy,* agreed that Petitioner failed in his threshold burden to establish his conduct, which was the substantial motivating factor in Respondents' decision, was protected. A simple failure of proof.

However, as noted in 1.A. above, the inquiry does not end if Petitioner is able to show some impermissible considerations motivated in part the adverse decision. The District Court correctly noted that certain impermissible considerations were taken into account to at least some extent by one or more of the Respondents. 409 F.Supp. 439, at 446. But, as the Court of Appeals correctly noted this is not dispositive. Petitioner likewise failed in the burden of showing these factors motivated in part the decision.

> "Assuming there were impermissible factors described in the report, or otherwise, the plaintiff did not show that these factors were a substantial or motivating factor in the decision not to hire him. The Trial court, on this point, stated that plaintiff must show that one or several of the prohibited considerations were 'paramount' in the refusal to hire. The Trial court held that plaintiff did not meet such a burden. This was a failure of proof, and we must agree with the Trial court's evaluation of the testimony. . . ." *Franklin* v. *Atkins*, 562 F.2d 1188, at 1191.

The Court of Appeals concluded that Petitioner's threshold burdens under *Mt. Healthy* had not been met. To hold otherwise would promote the very evil this Court sought to prevent in *Mt. Healthy*, to wit, an applicant might secure his position of prospective employment by injecting into a process, which by its very nature derives and considers information from a variety of sources, impermissible matters.

Assuming, arguendo, that the subordinate impermissible considerations motivated in part or played a substantial part in the decision, it does not follow, a fortiori, that a constitutional violation has occurred.

> "We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a 'substantial part' in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not." *Mt. Healthy, supra* at 287.

The burden shifts to Respondents to demonstrate that the decision would have been the same. Even this burden was found to have been met and was affirmed in the Court of Appeals' analysis:

> "The trial court also moved to an 'in any event' position and found as a fact that the vote would have been the same had impermissible matters not been 'considered'. The trial court held (409 F.Supp. 452):
>
> > 'Since it is apparent that the outcome of the vote would remain unchanged even ignoring the considerations prescribed by university regulation, it would be futile to grant plaintiff the injunctive relief sought under those regulations.'
>
> The 'considerations proscribed by University regulations' are for all practical purposes those matters which plaintiff asserts to be constitutionally protected. The regulations require that the Regents in faculty appointments be not influenced by . . . such extrinsic considerations as his political, social or religious views." 562 F.2d 1188, at 1192.

Thus, Petitioner has failed to demonstrate the permissible nature of his conduct as described in the Stanford Advisory Board Report primarily relied on by Respondents. Nor has he met the burden of showing subordinate motivating impermissible considerations. And, in any event, the Respondents met their burden of demonstrating the decision would have remained the same even had the impermissible considerations not been considered.

2. PETITIONER'S CONTENTION THAT THE COURT OF APPEALS ADOPTED AN ERRONEOUS "FORECAST OF DISRUPTION" THEORY IS INAPPOSITE SINCE RESPONDENTS' "FORECASTS" WERE BASED ON PAST IMPERMISSIBLE CONDUCT NOT SUBJECT TO THE "PRIOR RESTRAINT" HOLDINGS OF THIS COURT IN *HEALY* v. *JAMES*, 408 U.S. 169 (1972) AND *TINKER* v. *DES MOINES INDEPENDENT SCHOOL DISTRICT*, 393 U.S. 503 (1969).

Petitioner contends that the Court of Appeals' adoption by its last paragraph in its opinion, 562 F.2d 1188, at 1192 of the District Court's analysis of the danger of disruption felt by some of the Respondents is erroneous. However, Petitioner in his analysis proceeds from a faulty assumption that the issue of prior restraint of constitutionally protected activity is involved. To be so, the prior activity of the activity to be restrained must fall within the realm of protected activity. This threshold burden was never met by Petitioner with respect to his activities which resulted in the Stanford Advisory Board Report. Respondents admit, that at first blush, the District Court's ruling on this matter, affirmed by the Court of Appeals, is misleading. But, when read in the context of the determination that Franklin's conduct, as described in the Stanford Advisory Board Report, was not constitutionally protected, the resulting conclusion is, at least, valid.

A prospective employer might reasonably conclude that he runs a risk by hiring an employee, once culpable of inappropriate behavior, that the activity will reoccur. But this is not an undifferentiated fear or prior restraint of First Amendment freedoms. Simply put, the analysis to *Healy* and *Tinker* is inapposite.

Petitioner is an entity unto himself possessed of an employment record which could not or should not be ignored by Respondents in the exercise of their decision-making responsibilities. Nor is Petitioner's interest in a teaching job at a state university, simpliciter, a free speech interest, *Board of Regents* v. *Roth*, 408 U.S. 564, 575, n. 14; *Perry* v. *Sindermann*, *supra* at 599, n. 5, which would require stricter review of the basis of the denial of this interest.

The rejection of Petitioner's employment, absent a showing that said rejection was based on constitutionally impermissible considerations, was properly sustained by the Court of Appeals.

CONCLUSION

The Petition For Writ of Certiorari should be Denied.

Respectfully submitted,

JOHN P. HOLLOWAY
University of Colorado
Boulder, Colorado 80309
(303) 492-6208

RICHARD A. THARP
University of Colorado
Regent Hall, Box 13, Room 203
Boulder, Colorado 80309
(303) 492-7481
Counsel for Respondents

APPENDIX A

EXCERPTS FROM STANFORD ADVISORY BOARD REPORT AND DECISION CONCERNING H. BRUCE FRANKLIN

DESCRIPTION OF PROCEDURES

Pursuant to the provisions of Paragraph 15 of the *Statement of Policy on Appointment and Tenure,* the Advisory Board has held hearings on the charges preferred against Associate Professor H. Bruce Franklin by President Richard W. Lyman of Stanford University. Professor Franklin requested this hearing before the Advisory Board, which is the elected body of seven faculty members charged with the review of professorial appointments and promotions at Stanford University. Our decision as to findings of fact and recommendations based upon those findings follows. In this introduction, we will deal with several related matters: representation by legal counsel for the parties and for the Advisory Board; submissions and motions made before the hearings; hearing procedures and Board rulings not a part of the transcript; the schedule for the hearings and subsequent motions; exhibits, transcripts, further attachments and an outline of our report.

A. REPRESENTATION BY LEGAL COUNSEL

As provided for in Paragraph 15a of the *Statement of Policy on Appointment and Tenure,* both parties were entitled to representation by legal counsel.

* * *

E. HEARING PROCEDURES

The Board emphasized from the outset that this was an administrative proceedings, heard by an elected body of Professor Franklin's professional colleagues at his request, and that therefore it would not be appropriate to follow narrowly any explicit external model. We were not bound by the *Statement of Policy on Appointment and Tenure* to adhere rigorously to legal rules of evidence, and we did not. We did, however, require that evidence be relevant to the charges as drawn. We also adopted as a standard of proof that "strongly persuasive" evidence of culpability be provided. Professor Franklin's *Answer to Charges* introduced alternative defense based upon necessity and upon the Nuremberg principles. Since these were not argued in the hearings, our findings do not deal with them. Further details on procedures and standards are given in the Advisory Board's Response to Motions, and in its memorandum on procedures dated September 22, 1971.

As requested by Professor Franklin, the hearing was open; it was held in Room 101 of the Physics Lecture Hall on the Stanford campus. Except for two occasions on which the hearings were disrupted for brief periods of time, the hearing atmosphere was an orderly one, and we do not believe that the procedures adopted or the conditions of the hearings presented undue disadvantages for either party. For most of the hearings, closed-circuit television and radio coverage was provided, as requested in Professor Franklin's *Motions*.

As required by the *Statement of Policy on Appointment and Tenure*, a stenographic transcript of the hearing was made, and is supplied along with this report. The hearing commenced on September 28, 1971, at 1 p.m., and concluded on November 5, 1971, at 5 p.m. In the thirty-three days of hearings, the Advisory Board met for a total

of 160 hours and heard testimony from 111 witnesses representing the University Administration and Professor Franklin. The resulting transcript contains about one million words.

* * *

FINDINGS OF FACT: THE LODGE INCIDENT

A. CHARGES

The relevant University charges concerning the Lodge incident are contained in Paragraphs 6 and 7 of the *Statement of Charges* dated March 22, 1971. These paragraphs read as follows:

> 6. On January 11, 1971, Drs. Campbell and Tompkins and Ambassador Lodge attempted to proceed with the scheduled program at Dinkelspiel Auditorium but were prevented from doing so by disruptive conduct by various people in the audience. The disruptive conduct included, among other things, loud shouting, chanting and clapping. Because of the disruptive conduct the audience was often unable to hear the words of the speakers, Ambassador Lodge was prevented from delivering his speech, and the scheduled program had to be cancelled.
>
> 7. Professor Franklin was in the audience and knowingly and intentionally participated in the disruptive conduct specified in paragraph 6, significantly contributing thereby to the disruption which prevented Ambassador Lodge from speaking and which forced the cancellation of the program. Ambassador Lodge and Drs. Campbell and Tompkins were thus denied their rightful opportunity to be heard, and members of the audience were denied their rightful opportunity to hear and to assemble peacefully.

* * *

FINDINGS OF FACT: WHITE PLAZA INCIDENT AT NOON, FEB. 10, 1971

A. CHARGES

The relevant University charges concerning the White Plaza incident are contained in Paragraph 8 of the "Statement of Charges" dated March 22, 1971. This paragraph reads as follows:

> 8. On February 10, 1971, beginning at about 12 p.m., a rally was held at White Memorial Plaza to, among other things, discuss methods of protesting developments in the war in Indochina. Over five hundred students and other persons attended. During the course of the rally two principal courses of action were discussed, one being to work in the non-University community to bring about changes in government policy, the other being to disrupt University functions and business. Professor Franklin intentionally urged and incited students and other persons present at the rally to follow the latter course of action and specifically to shut down a University computer facility known as the Computation Center. Shortly thereafter a large number of students and others left the rally and went to the Computation Center whereupon many of these persons did in fact occupy the Computation Center, prevent its operation and obstruct movement in and out of the building for several hours, terminating this unlawful activity only when ordered to leave the building by the police.

B. NATURE OF THE CHARGE

The general charge is that Professor Franklin urged and incited the disruption of University functions; the specific charge is that he urged and incited his audience to shut down a University facility, the Computation Center. Effectively, this means that his words, including their delivery and their context, significantly increased the likelihood of prohibited conduct on the part of his audience; it means, moreover, that he must have anticipated that his speech, given its delivery and context, would significantly increase the imminent likelihood of prohibited conduct.

* * *

FINDINGS OF FACT: COMPUTATION CENTER INCIDENT

A. CHARGES

The relevant University charge concerning the Computation Center incident is contained in paragraph 9 of the "Statement of Charges."

> 9. Further, on February 10, 1971 and in connection with the activity at the Computation Center described in paragraph 8, students and other persons were arrested for failure to disperse after orders had been given to clear an area around the Computation Center. Professor Franklin significantly interfered with orderly dispersal by intentionally urging and inciting students and other persons present at the Computation Center to disregard or disobey such orders to disperse.

* * *

FINDINGS OF FACT: OLD UNION COURTYARD RALLY

B. NATURE OF THE CHARGE IN PARAGRAPH 10

The charge centers on intentional incitement that threatened: (1) disruption of University activities, both individual and institutional; and (2) injury to persons and property. It implies that a risk of coercive or violent behavior existed at the time of the rally and that Pro-

fessor Franklin further increased the risk by the content and manner of his participation. In determining whether the facts fit the charges, the Board must inquire (1) What is the entire context surrounding the alleged incitement? (2) What is being communicated to the audience? (3) What would the speaker judge to be the effect of his communication on the audience?

* * *

ADVISORY BOARD DECISION

1. *Findings on University Charges*

The following numbered paragraphs of the "Statement of Charges" of the University administration require a finding by the Board: 6, 7, 8, 9 and 10. Of these, No. 6 does not involve Professor Franklin's conduct, but is sustained unanimously by the Board.

The findings of fact by the seven-member Board on those paragraphs involving Professor Franklin's conduct are as follows:

7 *The Lodge Incident*

The Board unanimously does not sustain this charge.

8 *White Plaza Rally*

The Board unanimously sustains this charge.

9 *Computation Center Incident*

The Board sustains this charge. Two members of the Board (Brown, Kennedy) do not.

10 *Old Union Courtyard Rally*

The Board sustains this charge. Two members of the Board (Brown, Kennedy) do not.

The violations sustained constitute, in the Board's judgment, "substantial and manifest neglect of duty or personal conduct substantially imparing the individual's performance of his appropriate function within the University community," and are therefore sanctionable under the *Statement of Policy on Appointment and Tenure.*

2. *Sanctions*

The Board has sustained Professor Franklin's culpability on three charges, unanimously on one charge and with two of the seven members dissenting on two charges. The University administration argues that dismissal is the appropriate penalty for each of the three offenses.

We agree that each of the offenses is a serious one; since we find Professor Franklin culpable on three charges, we need not decide whether any one alone would justify dismissal. Taken together, however, the three offenses comprise, in our judgment, major violations of the professional responsibilities and duties of a professor in this University under the *Statement of Policy on Appointment and Tenure,* the *Policy on Campus Disruptions,* and the common traditions of this and other universities. Giving the fullest weight to Professor Franklin's personal rights to advocate vigorously his political views, we are unable to escape the conclusion that by his conduct he repeatedly and seriously infringed the rights of others in the University, and significantly increased the risk of injury to them and to University property. He did so by urging and inciting to the use of illegal coercion and violence, methods intolerable in a university devoted to the free exchange and exploration of ideas.

In the preceding *Discussion of Sanctions*, all the members of the Board enumerated the factors which affect the choice of proper sanctions, once findings of facts are

established. Accordingly, we considered possible mitigating circumstances as well as those circumstances which make Professor Franklin's behavior more unacceptable. We conclude that these roughly offset each other. On balance, they do not argue against what would otherwise be the appropriate penalty for such grave offenses. Nor do we doubt Professor Franklin's own testimony that he would continue the type of behavior charged here; indeed, he considered both his own and his political associates' behavior to have been "too weak" during some of the incidents covered by the charges.

The real issue in these hearings is Professor Franklin's behavior on the offenses charged, not his political views. Diversity of political views is a great asset to the University. The charges here, however, are incitement to use of unlawful coercion and violence and increasing the danger of injury to others as means to achieving Professor Franklin's goals; it is that behavior, not his political views and their expression, which we judge unacceptable. Indeed, we note with approval that others holding and expounding extreme political views are today highly respected members of the Stanford faculty. Our decision silences neither political dissent nor criticism of the University. The only speech or behavior repressed by this Board's findings is that which clearly urges and incites others to unlawful coercion or violence, or to acts likely to increase the risk of injury to other persons. We believe such behavior should be restrained; insistence on such standards of faculty conduct will not chill open and robust dissent on this or any other campus.

The Board is also critical of Professor Franklin's deliberate choice, demonstrated by action as well as by his testimony, to attempt to protect his own position as professor in the University while at the same time inciting

others, including students, to expose themselves to expulsion or criminal charges.

Despite the severity of these offenses, we have weighed carefully possible sanctions short of dismissal. But a lesser penalty would fail to recognize the fundamental nature and severity of Professor Franklin's attacks on the University of which he is a member. Tolerance of such attacks on the freedom of others, under the guise of protecting Professor Franklin's freedom to act as he wishes, would be subversion, not support of true academic freedom and individual rights. It is precisely because unlawful coercion and violence infringe upon the rights of others in the University that the charges against Professor Franklin are such serious ones.

We believe, given all these considerations, that immediate dismissal of Professor Franklin from the University is warranted. In view of the difficulty of developing alternative sources of income at this time, we recommend that a sum equal to Professor Franklin's salary until August 31, 1972, be paid to him.